

**RHB Bank Bhd v
Oilangas Shipping Services (M) Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D6-
28-516 OF 1998

REKHRAJ J

15 OCTOBER 1998

Companies and Corporations — Winding up — Discontinuance of — Leave to withdraw proceedings without liberty to file afresh except with prior leave of court — Whether leave to discontinue should be made conditionally, subject to obtaining of leave of court

The petitioner filed a winding-up petition against the respondent. Subsequently, the petitioner's solicitors informed the court of an agreement that had been entered between the parties arriving at a settlement and seeking leave of the court to withdraw the proceedings with liberty to file afresh. The court granted leave to withdraw but without liberty except with the prior leave of the court first had and obtained, and the petitioners now being dissatisfied, appealed against that part of the order, refusing them the liberty.

Held, dismissing the appeal:

- (1) The petitioner was at their absolute liberty under s 221 of the Companies Act 1965 either to proceed or discontinue the petition by withdrawing the same with the leave of the court; but the court in granting such withdrawal could place conditions to prevent an abuse of the process of court in their refile de novo (see p 448D-E).
- (2) Once the papers are in order, the petitioner should be put to the only option to either proceed head on to wind up or, at their choice, withdraw — with no liberty; because by then the act/or the presumption of being unable to pay the debt, has been activated against the company; and the petitioner must not then be allowed to do so, in a way as would leave them free to revive the petition at will. For that reason, leave to discontinue was made conditionally, subject to the obtaining of the leave of the court (see p 448E-F).

[Bahasa Malaysia summary]

Pempetisyen telah memfailkan petisyen penggulungan terhadap penentang. Berikutnya, peguamcara pempetisyen memaklumkan kepada mahkamah mengenai suatu perjanjian yang telah diikat di antara pihak yang mencapai penyelesaian dan meminta kebenaran daripada mahkamah untuk menarik balik prosiding dengan kebebasan untuk memfailkan semula. Mahkamah memberikan kebenaran untuk menarik balik tetapi tanpa kebebasan melainkan dengan kebenaran terdahulu mahkamah pertama yang memberikannya, dan pempetisyen yang tidak berpuas hati, merayu terhadap bahagian perintah itu, menolak kebebasan.

A Diputuskan, menolak rayuan:

(1) Pempetisyen adalah bebas di bawah s 221 Akta Syarikat 1965 sama ada untuk meneruskan atau memberhentikan petisyen tersebut dengan menarik balik yang sama dengan kebenaran daripada mahkamah; tetapi mahkamah dalam memberikan penarikan balik sedemikian boleh mengenakan syarat-syarat bagi menghalang penyalahgunaan proses mahkamah dengan memfailkan semula de novo (lihat ms 448D–E).

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(2) Sebaik saja dokumen berkenaan teratur, pempetisyen seharusnya diberikan satu-satunya opsi untuk sama ada meneruskan penggulangan atau, atas pilihan mereka, menarik balik — tanpa sebarang kebebasan; kerana pada masa itu perbuatan/atau anggapan ketidakmampuan untuk membayar hutang tersebut, telah diaktifkan terhadap syarikat tersebut; dan pempetisyen mestilah tidak dibenarkan untuk berbuat demikian, dalam cara yang mungkin membebaskan mereka untuk memulihkan semula dengan sesuka hati. Untuk alasan itu, kebenaran untuk memberhenti telah dibuat dengan syarat, tertakluk kepada pemerolehan kebenaran daripada mahkamah (lihat ms 448E–F).]

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Notes

E For cases on winding-up generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 618–918.

Case referred to

F

Sailport Pty Ltd, Re (1990) 8 ACLC 400 (refd)

Legislation referred to

Companies Act 1965 ss 217(1)(b), 218(1)(a), 221, 223

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TM Eng (Shook Lin & Bok) for the petitioner.

S Bhavani (Lawrence & Co) for the respondent.

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Rekhraj J: The petitioner filed a petition on 20 July 1998 against the respondent after the respondent had failed and or neglected to comply with the statutory notice under s 218(1)(a) of the Companies Act 1965 ('the Act') claiming a sum of RM543,974.12 being the amount due to the petitioner under a judgment of the Kuala Lumpur High Court dated 28 November 1996, together with fixed continuing interest charged at the rate of 2.5%pa above the effective costs of funds from 1 September 1994, to the date of final payment and together with further interest at the rate of 1%pa on the total unpaid final payment.

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The petition was fixed for hearing on 24 September 1998; and the respondents proceeded to file a notice of intention to oppose the petition supported by an affidavit affirmed by Mohsein bin Mokhtar — the manager of the respondent company.

At the hearing of the petition, the petitioner's solicitors asked for an adjournment to enable them to put an affidavit in reply and the court adjourned the hearing to 15 October 1998.

At the adjourned hearing, the petitioner's solicitors informed the court of an agreement that has been entered between the parties arriving at a settlement and seeking leave of the court to withdraw the proceedings with liberty to file afresh.

The court granted leave to withdraw but without liberty except with the prior leave of the court first had and obtained, and the petitioners now being dissatisfied, appeal against that part of the order, refusing them the liberty.

Winding-up is a drastic weapon available to a creditor under s 217(1)(b) of the Act and the court must proceed expeditiously in its disposal as the delay not only paralyzes the company's management in its continuity, but puts the banks of the respondent in a bind under s 223 of the Act — in its disposition of the company's funds and/or a prohibition on the execution of proceeding if any, against the company — because the winding-up order relates back to the date of the presentation of the petition.

The petitioners were at their absolute liberty under s 221 of the Act either to proceed or discontinue the petition by withdrawing the same with the leave of the court; but the court in granting such withdrawal could place conditions to prevent an abuse of the process of court in their refiling de novo; an exercise to frustrate the due process of court in clearing its long backlog of cases.

I am of the view that once the papers are in order, the petitioner should be put to the only option to either proceed head on to wind up or, at their choice, withdraw — with no liberty; because by then the act/or the presumption of being unable to pay the debt, has been activated against the company; and the petitioner must not then be allowed to do so, in a way as would leave them free to revive the petition at will (*Re Sailport Pty Ltd* (1990) 8 ACLC 400). For that reason, leave to discontinue was made conditionally, subject to the obtaining of the leave of the court.

Appeal dismissed.

Reported by Loo Lai Mee

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